DATE: AUGUST 12, 1998

In the Matter of

LAXMI N. KHANDELWAL,
Complainant

v.

SOUTHERN CALIFORNIA EDISON,
Respondent.

Case No. 97-ERA-6

Appearances:

Laxmi N. Khandelwal
12615 E. Lucas Street
Cerritos, CA 90703-1132
Pro Se

Thomas A. Schmutz
Paul J. Zaffuts
Morgan Lewis & Bockius, LLP
1800 M Street, NW
Washington, D.C. 20036
For the Respondent

Before: Henry B. Lasky
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended in 1992 (ERA), 42 U.S.C. § 5851 *et seq*. Complainant Laxmi Khandelwal was employed as an engineer for Respondent Southern California Edison (SCE) for 23 years, whereupon he executed a severance agreement and accepted early retirement in July of 1995. Thereafter, Complainant filed his complaint on September 21, 1995 against SCE alleging that the employment severance and several earlier personnel actions were retaliatory and unlawful

under Section 211 of the ERA. Section 211 as amended, generally provides that no employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in activities that were statutorily protected. Section 211 (a)(1)(A)-(F). The applicable regulations enacted thereunder are contained at 29 C.F.R. Part 24. *See also* 29 C.F.R. § 24.2(a)-(c).

Pursuant to a trial notice issued by the undersigned on April 7, 1998, a trial of Mr. Khandelwal's Section 211 complaint was convened on May 28 and 29, 1998 in Long Beach, California. For purposes of the record, it is noted from the outset that Complainant has elected to proceed *pro se* in this matter. As this case has been in the jurisdiction of the Office of Administrative Law Judges since November of 1996, Complainant has had ample time and opportunity to seek the advice and/or representation of counsel. Although Complainant has corresponded to the undersigned in the past regarding his desire to seek counsel and he acknowledged at the trial that he consulted with two different attorneys prior to trial, Complainant ultimately did not obtain counsel and elected to represent himself.

I. PROCEDURAL HISTORY

As previously stated, the underlying complaint in this matter was filed with the Wage and Hour Division of the U.S. Department of Labor on September 21, 1995, by Complainant. On October 2, 1995, the Assistant District Director of the Wage and Hour Division, Donald Wiley, acknowledged receipt of Mr. Khandelwal's complaint alleging discriminatory employment practices in violation of the ERA. Mr. Wiley stated that the matter would be assigned to Investigator Geraldine Rimple, and if a mutually agreeable settlement between Complainant and SCE was not attainable then the matter would be investigated for further fact-finding.

SCE responded to Mr. Wiley's correspondence on October 16, 1995, by stating that Mr. Khandelwal had released SCE from any claim relating to his employment with SCE, including his employment severance and any action which led to the severance. In consideration for such release, SCE paid Complainant approximately $70,00.00. SCE further requested that the Wage and Hour Division dismiss Mr. Khandelwal's complaint, as all matters relating to Mr. Khandlewal's employment had already been settled by virtue of the Severance Agreement and Release (Agreement).

On August 15, 1996, Maria Echaveste, an Administrator with the Wage and Hour Division, corresponded to SCE outlining the policy and procedures for an investigation where the complainant had previously executed a severance agreement with his employer relinquishing all existing claims. The letter stated that if an investigation concluded that an employee knowingly and voluntarily entered into a fair, adequate, and reasonable severance agreement that was not contrary to public policy, the complaint would be dismissed in a similar fashion to situations in which the complainant did not make a prima facie case pursuant to Section 211 (b)(3)(A).

Thereafter, a letter dated October 3, 1996 from the District Director of the Wage and Hour division was sent to Mr. Khandelwal dismissing his complaint. The letter stated that an investigation concluded that Complainant's termination was not based on discrimination, but rather was a planned reduction in force. Moreover, there was no indication that Complainant was coerced or under duress to accept the severance package. Mr. Khandelwal appealed this preliminary finding, and the case was transferred to the Office of Administrative Law Judges and assigned to the undersigned for further disposition. A trial was scheduled to commence on December 12, 1996.

Prior to the date of trial, Respondent concurrently submitted a Motion for Summary Decision and a Motion for Continuance until a decision with respect to the former motion could be rendered. The undersigned granted Respondent's Motion for Continuance, and afforded Complainant the opportunity to respond to Respondent's Motion for Summary Decision. After considering the arguments of both parties, the undersigned issued a Recommended Order Granting Summary Decision and Dismissal of Complaint (R.O.) on January 17, 1997.

The Recommended Order concluded that the Agreement which Complainant entered into with SCE was written and executed under normal contract principles, and thus, enforceable. The undersigned found that the Agreement was not violative of public policy; that Complainant executed the Agreement knowingly and voluntarily; and that Complainant's ratification of the Agreement negated any claim of duress. R.O. at pp. 5-9. Based on such findings, the undersigned concluded that Complainant failed to present any affirmative evidence showing a genuine issue of material fact, and thus granted Respondent's Motion for Summary Decision.

At such time, Complainant appealed the undersigned's Recommended Order Granting Motion for Summary Decision and Dismissal of Complaint to the Administrative Review Board (ARB). The Order Establishing Briefing Schedule indicated that the record would be closed on April 17, 1997. However, the Acting Assistant Secretary for Occupational Safety and Health (OSHA), requested leave to file an *amicus curiae* brief. Once all briefs were submitted and considered, the ARB issued a disposition on March 31, 1998, rejecting the undersigned's recommendation and remanding the case for further proceedings consistent with its decision. ARB Decision and Order of Remand, ARB Case No. 97-050.

The ARB concluded that "[w]hile an employer may proffer as an affirmative defense to an ERA complaint an agreement containing a waiver of the employee's right to recover damages,[] any waiver of his right to file an ERA claim as a condition of the agreement is void." ARB Decision and Order of Remand, p. 4. Moreover, the ARB rejected the conclusion that Complainant ratified the void provision by retaining the monetary consideration, as a provision contrary to public policy, such as the one at issue, cannot be validated by ratification. ARB Decision and Order of Remand, p. 5.

After the issuance of the ARB's Decision and Order of Remand, the entire case file was transferred to and subsequently received in the office of the undersigned on May 12, 1998. Based

on the ARB's foregoing conclusions, a formal hearing was conducted on the merits of Mr. Khandelwal's underlying complaints against SCE, and their alleged violation of Section 211 of the ERA. At the time of the hearing, Complainant's exhibits (CX) A1-A43, B1-B39, D4, D5, D8, D9, D11, and D13 and Respondent's exhibits (RX) 1-46 were admitted into the record.

At such time, the parties stipulated that the Respondent was subject to Section 211 of the Act, and that Complainant was a covered employee under the same while in the employ of SCE. As such, there are no jurisdictional issues to be resolved. It is also noted for the record that Respondent moved to dismiss this matter after Complainant presented its case in chief "on the grounds that Mr. Khandelwal failed or did not entirely show any causal connection between any protected activity he might have engaged in and his termination in 1995." The undersigned denied Respondent's motion on the basis that it appeared that Complainant had presented a sufficient amount of evidence to demonstrate a *prima facie* case and so that the undersigned would have knowledge of the entire record prior to adjudicating the merits of the matter.

The parties were ordered to file Proposed Findings of Fact and Conclusions of Law on or before July 15, 1998, and such submissions were received from the parties within the time required. Prior to closing the record, however, Complainant indicated a belief that there were multiple substantive errors in the certified trial transcript. Based on such representation, the parties were afforded the opportunity to file written motions and objections thereto for the correction of specified text in the transcript. Having received and considered such submissions, the undersigned issued an Order making the appropriate and necessary corrections to the certified trial transcript.

Based upon the stipulations of Complainant and counsel for Respondent, the evidence introduced at the trial, the testimony of the witnesses, and having considered the arguments made in their post-trial submissions, I make the following findings of fact, conclusions of law, and recommended decision and order.

II. FINDINGS OF FACT

A. Background

Complainant was employed as an engineer for SCE in various capacities from August of 1972 through July of 1995. Transcript (TR) 61. In 1974, Complainant was assigned to work in SCE's Nuclear Engineering and Design Organization (NEDO) at the San Onofre Nuclear Generating Station Units (SONGS) 1, 2 & 3. He continued to work there until the time of his termination in July of 1995. TR 63. Complainant worked as a Level I Engineer from the date of hire until he was promoted to the position of Senior Engineer II in May of 1992. CX A23.1. It is clear from the record that Claimant's work performance up through the time of his promotion in May of 1992, was technically sound and that he had consistently performed as a competent engineer. CX A1.1-A43.2. Respondent has never disputed the value of Complainant's work prior to the instant actions that have occurred herein.

Complainant states that the primary source of his protected activity was in 1993, when he had "raised some perceived safety and compliance issues regarding MDR and Agastat relays" as an equipment group supervisor. TR 63. He stated that because such issues were critical for safety purposes, he brought it to the attention of his superiors so as to obtain approval to expend man hours to address the problem. TR 65. Complainant testified that management ignored the problem and retaliated against Complainant for raising such compliance issues. Complainant believes that Respondent's retaliation came in the form of three acts: a demotion in November of 1993, a subsequent performance appraisal for 1993 which was a "below standard evaluation", and his ultimate termination from SCE in July of 1995. TR 65-66, 68.

1. The Relay Master List project

SONGS had established a Nuclear Consolidated Data Base (NCDB) group in 1990 to develop a complex site-wide data base to compound 15 years worth of engineering data. TR 202-03, 281. While the project was first established in the controls discipline[1], NCDB also began to study the data bases and information in the other NEDO group disciplines. TR 203. The initial work of the data base was to be assigned to and performed by a senior individual within each of the disciplines. TR 203. The senior individual was expected to produce a scoping document which described the data that had already been collected, the data that was to be collected, and a determination of how such data would be compiled and subsequently transferred into a central computer system. TR 203-04. It was estimated that the preparation of a scoping document could take between 400-500 man hours. TR 204; RX 3:1. Once the scoping document was complete, the NCDB project steering committee would review the same and either recommend the authorization of funds and subsequent production of work, or the NCDB would deny approval until the project was properly thought out. TR 204-05, 274.

Kenneth Johnson, the assistant manager of the entire NEDO group and NCDB project manager in 1993, provided extensive testimony about the NCDB and Complainant's involvement in the relay data base. TR 200; RX 5:1. Originally, Alan Kaneko, the supervisor of the NCDB group, was given the overall responsibility for compiling a Relay Master List (RML) in the electrical discipline. TR 207. The RML project was intended to provide an overall list of relays[2] in use at SONGS, including information concerning model type, qualification history, and service

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[1] Respondent's exhibits 5 and 6 delineate the employment and managerial structure of the NEDO group at SONGS. Within NEDO, there are various groups of employees delineated by "discipline." Within each discipline, there is a discipline manager, and various group supervisors working underneath the discipline manager. For instance, in April of 1993 Mr. Khandelwal was the equipment group supervisor in the electrical discipline, which was led by discipline manager, Bernie Carlisle. RX 5:1; RX 6:1.

[2] Mr. Johnson explained that an electrical relay is a type of electrical switch that opens and closes an electrical circuit under certain conditions. TR 206.

life. RX 3:2. Beginning in 1992, Complainant became the lead supervisor of the RML project. The employees assisting Complainant were Roberto Cruz, John Oh, and Asok Biswas. TR 75, 144; RX 4:1.

On May 4, 1993, Complainant's discipline manager, Bernie Carlisle, advised Complainant that he was to suspend all work on the RML until a presentation was given before the NCDB Steering Committee, and that a dry run of the presentation should be made in front of Mr. Kaneko and himself prior to the NCDB Steering Committee presentation. B25.216. At such time, Complainant placed the presentation on the NCDB agenda for June 7, 1993, and scheduled a dry-run presentation prior to that time on May 28, 1993. B25.221; B25.241.

As planned, Complainant performed a dry-run presentation of his RML findings before Bernie Carlisle, Ken Johnson, and Alan Kaneko, with the aid of Roberto Cruz. TR 213, 274; RX 4:1. Although Complainant testified that he understood the purpose of the meeting to be the justification for continuing work on the RML, he also stated that he was unaware that the main purpose of the NCDB meeting was to get approval from NCDB so as to obtain further funding on the project. TR 138. Complainant testified that he was unaware that the NCDB was even in existence at the time and that the NCDB was the primary funding source for the RML project; however, it is clear from the record that absent approval by the NCDB on the RML project, funding would not be available for continued work on the project. TR 138-42.

It is also apparent from the various witnesses who testified at the hearing and statements made by others who were present at the dry-run presentation, that Complainant's presentation on May 28, 1993 was deficient in many respects. TR 276, 280; RX 3:2. Mr. Johnson stated,

> [T]his document didn't meet the steering committee's fundamental requirements of the scoping document for approval. It wasn't clear what was to be produced, how the data was to be collected and computerized. The benefits were not adequately quantified, the people who were going [to] use the data and the frequency they would use the data was not present in the document. And there was no plan showing the scheduled duration and the number of man hours per month, per the work direction on how to accomplish what they were going to do. TR 214.

Mr. Johnson further testified that Mr. Carlisle and Mr. Kaneko agreed with the conclusion that the document was inadequate, and was not ready for presentation before the NCDB Steering Committee. TR 147, 149, 214, 217; B25.266. After this meeting, Mr. Carlisle, Mr. Johnson and Mr. Kaneko decided to downsize the project, transferring the responsibility of developing the RML back to Mr. Kaneko and the NCDB group. TR 218; RX 3:2. Thus, the 3,200 man hours and approximate $150,000 expended on the RML project, while under the supervision of Complainant, was discarded and abandoned for budgetary reasons. TR 149, 218-19. As such, the group of engineers assigned to this task were re-assigned to other duties. CX B25.266.

Mr. Johnson provided testimony regarding the ultimate results of the RML project. Not

only was the scoping effort successfully performed after 400 man hours in 1994, but the entire project was produced in a total of 7,500 man hours in 1995. TR 219. This is in sharp contrast to Complainant's originally expended 3,200 man hours on the scoping effort, and his proposed 13,100 man hours to complete the project. TR 220; RX 25.

2. Complainant's 1993 demotion

In November of 1993, Complainant's discipline manager, Mr. Carlisle, was forced to leave active employment because of a medical condition. In light of the fact that there would be an ensuing reduction in force, it was Mike Wharton's decision to eliminate Mr. Carlisle's position altogether and consolidate the electrical and control disciplines. TR 221. Mr. Wharton was the manager of the entire NEDO group, and the overall supervisor of all discipline managers. A consolidation of the electrical and control disciplines would eventually enable the consolidated groups to have one discipline manager in charge of 53 employees. TR 221. Although there were 13 supervisors upon consolidation, only 9 were needed. TR 129, 222.

The process of reducing the number of supervisors in the consolidated group was based on an evaluation of employee performance in certain areas. RX 42. Four discipline managers participated in the evaluation process: Mr. T. Yackle, the nuclear/mechanical discipline manager; Mr. R. St. Onge, the controls discipline manager who ultimately became the project engineer manager and the NCDB project manager; Mr. R. Verbeck, the civil/plant design manager; and Mr. Johnson, the assistant manager of NEDO. TR 224. The results of the evaluations are found at Respondent's exhibit 43. All four managers placed Complainant at the bottom of the rating scheme, effectively ranking his job performance as last out of 13 people. TR 130-31; 225; RX 43. As a result of these evaluations, Complainant, along with the three other supervisors who ranked at the bottom of the list were demoted from their supervisory engineering position. TR 226.

3. Complainant's 1993 performance evaluation

Mr. Johnson prepared Complainant's performance evaluation for the 1993 calendar year, as Complainant's previous discipline manager, Mr. Carlisle, was no longer actively working for the company, and his new discipline manager of two weeks did not feel qualified. TR 233-34; *see also* TR 268. Mr. Johnson testified that his evaluation of 23 was based on Mr. Carlisle's mid-year review and a review of Complainant's performance subsequent to that review. TR 154, 236. Mr. Johnson explained that his process was to validate the four specific comments that Mr. Carlisle had made in the mid-year review, and "find out how his performance may be either the same, better or worse than described in his four areas." TR 236; RX 10; *see* RX 3. Mr. Johnson further testified that he believed it was appropriate to include the negative comments with respect to Complainant's work on the RML project on the performance evaluation for the 1993 year, as the "ultimate acceptance and approval of that work was always planned for calendar year 1993." TR 242-42.

Subsequent to Complainant receiving his 1993 evaluation in May of 1994, Complainant

challenged the same in June of 1994. TR 69, 78, 160. Complainant testified that there was a series of informal conversations and memoranda exchanged between himself and Mr. Johnson. TR 69-70, 71-72. At the conclusion of such exchange, Mr. Johnson wrote a formal Request for Review Level One Response, and stated that Complainant's 1993 performance evaluations was "valid as written" CX B20.4. At such time, Complainant then proceeded to engage in the formal corporate procedure, utilizing the Request for Review Level Two with upper management. TR 73; 78-79; CX B22.2. Complainant compiled relevant documentation of his work history as a supervisor and the projects that he performed with his group, and submitted such documentation to Mr. Wharton. TR 78-79, 153; B25.1-B25.3. An independent review was conducted by Mr. Wharton, Doug Stickney, and Julie Hoffman. TR 261. Ultimately, Complainant's performance appraisal was revised upward to a score of 27 in October of 1994, and the negative appraisal was removed from his personnel file. TR 82-83, 154.

4. Complainant's July 1995 termination

Brian Katz, currently employed as a manager of business and financial services for SCE, testified on behalf of Respondent. TR 179. In 1993, during the time in which SCE decreased the total number of employees working at SONGS, Mr. Katz was the manager of nuclear oversight, overseeing approximately 130-140 people. TR 179-80. In such position, Mr. Katz was involved in a study to determine proper staffing levels at the SONGS plant, as one of three units at SONGS would no longer be in service. TR 180. Mr. Katz' extensive report, referred to as the "Katz Staffing Study," was a refinement of work based on a study done by a known industry consultant in the area of nuclear power plant staffing, known as Timothy Martin and Associates. TR 180-81; RX 34. Among other significant reductions, Mr. Katz ultimately recommended that the number of electrical engineers in the NEDO group be reduced from 93 people to 53 people. TR 184-85, *see also* TR 332-33; RX 34:43.

Mr. Katz testified about a number of letters written by Harold Ray, Senior Vice President of Nuclear Generation, regarding the reduction in force process. TR 180. On June 9, 1994, Mr. Ray wrote a memo notifying the Nuclear Organization personnel that there was to be a planned severance of 45 management and administrative employees and 16 bargaining unit employees during the week of June 13, 1994. TR 187, RX 27. On January 13, 1995, Mr. Ray wrote a second memo detailing the second severance period to begin the week of January 16, 1995 for 15 management positions. TR 187; RX 30. Finally, a third memo was written on July 5, 1995, indicating that a further reduction of 53 management positions would be made the week of July 10, 1995. TR 188; RX 28.

Mr. Katz was greatly involved in the process of reducing employees at SONGS. Not only did Mr. Katz perform the staffing study which the reduction in force is based on, but Mr. Katz also participated in the presentation to SCE's corporate headquarter to obtain approval for such actions. TR 189. The presentation consisted of providing corporate SCE with the business justification for the reduction in force, the number of people that would be terminated, and the procedure for the selection of individuals for termination. TR 190-93. The stated criteria for the

selection of such individuals was three-fold: the employee's job performance in the past 3 years, the employee's required skill mix, and the employee's job knowledge and special expertise. RX 29:11; TR 193.

As Complainant's discipline manager at the time, Mr. Johnson testified about the reasons for Complainant's termination,

> Mr. Khandelwal as well as the other six individuals from my department were released because capital funded projects were being dramatically reduced during calendar year 1995, and in the immediate following year. The need for the type of expertise for capital projects within NEDO had been reduced such that the responsibility — the other responsibilities of these incumbents would be assumed by other staff engineers thus eliminated the need for these seven permanent Edison positions within my department. TR 335.

During trial, Complainant testified that he was advised that NEDO would be experiencing a reduction in the amount of employees, wherein 53 management positions would be terminated the week of July 10, 1995. TR 167. He testified that the management stated his termination was necessary because his position had been abolished. TR 86, 88-89. At such time, Complainant was presented with a severance agreement, which he ultimately signed on July 26, 1995.

B. Complainant's Protected Activity

Complainant contends that he engaged in protected activity on several occasions in 1993 and 1994, and that SCE subsequently discriminated against him in retaliation for this activity. Complainant's protected activity involved the qualification of two types of electrical relays used at SONGS, the Agastat E7000 relay and the MDR relay. Complainant testified that he first became aware of an issue involving the Agastat relay in March of 1992. TR 109; CX B6.1. In a letter from the manufacturer, Complainant learned that although the Agastat E7000 series relays had a qualified life of ten years in a de-energized state, there was no information about the useful life of the relay in an energized state. CX B6.1.

It was approximately 14 months later when Complainant first raised the issue of the Agastat relay's qualified life to management. TR 109-10. During the dry-run presentation on May 28, 1993, Complainant provided the attendees with a hand-out detailing his scoping efforts. In the text of the document, Complainant included a general discussion about the Agastat relay and its qualified life. RX 24:5. There is substantial testimony, however, that there was no verbal discussion of such issue during the dry-run presentation. TR 119, 216, 276.

Complainant states that he next engaged in protected activity on June 30, 1993, when he sent an E-mail message to his discipline manager, Mr. Carlisle, regarding MDR relays and their qualification of life. TR 75-75; CX B3.1. Although there is no evidence that Complainant ever discussed the contents of this E-mail with Mr. Carlisle, in a September 8, 1993 E-mail,

Complainant did attempt to arrange a meeting with Mr. Carlisle regarding such issue. TR 75-76; CX B5.1.

In January of 1994, Complainant was involved in a meeting with his then supervisor, Anthony Grande, another supervisor by the name of Doug Stickney,[3] and Mr. Johnson. TR 44, 46, 227, 254. It was Mr. Grande's testimony that the purpose of the meeting was to discuss the proposal of expending additional man hours to investigate the issue of Complainant's compliance concerns with respect to MDR relays, and that the June 30, 1993 E-mail addressed to Mr. Carlisle was the initiating point for such discussion. TR 52, 54, 56. However, Complainant subsequently testified that although he had given the June 30, 1993 E-mail to Mr. Johnson at the meeting, the contents of the E-mail were never discussed. TR 120, 125-26, 228, 231-32; B3.1. Rather, Complainant admitted that the purpose of the meeting was to discuss the Regulatory Compliance Tracking System, an industry-wide MDR relay problem not associated with the problem which Complainant had raised. TR 127-29. Neither Mr. Grande nor Mr. Stickney specifically remember discussing the substantive issue of Complainant's compliance concerns. Both supervisors, however, do recall Mr. Johnson's reaction to having received the June 30, 1993 E-mail.

Mr. Grande testified that during the January 1994 meeting, Mr. Johnson stated that the lack of timely attention to the continuing MDR compliance issues could result in criminal penalties for management. TR 53. Based on Mr. Johnson's statements, Mr. Grande understood that Mr. Johnson was upset that the issue had languished and that he wanted it resolved promptly. TR 54. Mr. Stickney recalls very little about the meeting, but that Mr. Johnson questioned Mr. Grande and Complainant as to why a SONGS Non-Conformance Report (NCR) identifying the issue had not been written. TR 255-56. Mr. Stickney understood that Mr. Johnson was not really concerned about the substantive issue that Complainant had raised, but rather was more concerned about the issue being dealt with in a proper manner. TR 256.

At the time of the January 1994 meeting, Mr. Johnson had recently become the discipline manager for the combined electrical/controls group. TR 228-29. Based on the fact that Complainant's E-mail was dated in June of 1993, Mr. Johnson testified that he was concerned that such issue had not been resolved between Complainant and his then discipline manager in more than a six month period. TR 229. Mr. Johnson testified that he was upset, not about the

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[3] Mr. Grande (Complainant's own witness), Mr. Johnson, and Mr. Stickney all testified that Mr. Stickney was present at the January 1994 meeting (TR 46, 227, 254). However, Complainant vehemently argues that Mr. Stickney was not present. TR 398-400; *Complainant's Proposed Findings of Fact and Conclusions of Law, pps. 14-16.* Other than Complainant's own testimony, the only evidence that he provides to support his position are three pieces of correspondence that he has written regarding the meeting. Complainant argues that because such correspondence fails to acknowledge Mr. Stickney's presence, then he must not have been there. Such assertion is not "evidence"; and Complainant fails to provide any facts to suggest otherwise. Thus, based on the testimony of the three foregoing witnesses, it is reasonable to conclude that Mr. Stickney was present at the meeting, and the undersigned shall proceed with the remainder of this discussion as such.

particular issue of MDR relays which Complainant had raised and which could easily be solved, but rather, at the possibility that there were similar issues that were languishing in "somebody's file drawer or in somebody's computer." TR 229. Ultimately, Mr. Johnson did not make a specific assignment to either supervisor to resolve the issue, as he believed that it had been made clear to both of them that "either one or both would handle it." TR 230.

Complainant contends he next raised the relay issues with his new supervisor, Mr. Stickney at the end of January or the beginning of February 1994. TR 77. At such time, Complainant submitted a large amount of material to Mr. Stickney. This material related either to various open assignments that Complainant had previously done as a supervisor or work that he had performed under the supervision of Mr. Grande; this material allegedly contained references to the relay compliance issues. TR 77-78, 258. Complainant made no verbal reference to the compliance issues at the time he turned over the materials, but rather Mr. Stickney understood Complainant was providing him with the materials merely to bring him "up to speed" on open assignments. TR 259. Shortly thereafter, Mr. Stickney was transferred to another supervisory position, and gave the materials to Mr. Ambrose Mationg, Complainant's new supervisor. TR 260.

Finally, it appears that Claimant last raised the MDR and Agastat relay issues during a meeting with Mr. Johnson on June 14, 1994. Although the purpose of the meeting was for Complainant to discuss his 1993 performance evaluation with Mr. Johnson, Complainant also advised Mr. Johnson that MDR and Agastat relay compliance and safety issues had existed since the time when Complainant was a supervisor. TR 160. Again, while there was no substantive discussion regarding the compliance and safety issues, Mr. Johnson ultimately requested Complainant to prepare a memorandum by June 24, 1994, describing the particulars of the issue. TR 161, 245-46, 248; RX 17:6. Complainant provided Mr. Johnson with an E-mail dated June 24, 1994, describing what he believed were compliance issues associated with the MDR and Agastat relays. TR 80-81; CX B17.1-17.6. At such time, Mr. Johnson enlisted the help of Mr. Rice Berkshire, the environmental qualification group supervisor, to resolve the issues. TR 81, 164, 249, 319-21. An investigation was performed under the supervision of Mr. Berkshire; the results of such investigation are detailed in two separate reports entitled, "Review of MDR Qualification Issues," and "Review of Normally Energized Agastat E7000 Series Relay Replacement Interval issue." *See RX 1, RX 2.*

C. Independent Investigations of Complainant's Complaint

Complainant testified that he contacted the Nuclear Safety Concerns (NSC) group within SCE's Nuclear Oversight Division in June of 1994, regarding the safety and compliance issues that he had raised and the retaliatory behavior that he was being subjected to by his supervisors. TR 81-82. Complainant also sent an E-mail on July 6, 1994 to Mr. Wharton regarding the same. TR 82; CX B19.1. The NSC group performed an investigation into the two matters which Complainant had raised before them, the technical issue of the electrical relays and the 1993 midterm and annual performance evaluations. Willis Frick, the manager of the NSC group,

testified on behalf of Respondent about the results of the independent investigation performed by the NSC.

With respect to the technical issue that Complainant had raised, Mr. Frick stated that independent technical investigations of the potential MDR and Agastat relay problems were being conducted by qualified employees within NEDO and were already in progress.[4] TR 368-69. Once such investigations were concluded, the results were forwarded to Mr. Frick. TR 369; *see also RX 1, RX 2*. At such time, Mr. Frick selected an expert, registered professional electrical engineer John Chang, to review the reports. TR 369. Mr. Chang concluded that the reports were satisfactory; that the reports did not substantiate Complainant's concerns; and that the results were ultimately useful in the operation of the plant. TR 369.

Two investigators, William Morris and David Askey, conducted an investigation to assess the validity of Complainant's second issue, that his performance evaluations were adversely affected by his engaging in protected activity. TR 371. In order to evaluate the appropriateness of the negative comments alleged in Complainant's midterm and annual performance evaluation, Mr. Morris and Mr. Askey interviewed Complainant, his current and past supervisors, his peers, and other people who had worked with him. TR 371. Such investigation concluded that there was no evidence to indicate that his midterm or annual performance apprisal had been influenced in any way by Complainant having raised safety concerns. TR 371.

On November 14, 1994, Mr. Frick, Mr. Morris, and Mr. Askey met with Complainant to discuss the results of the NSC group investigation. TR 370, 372. It was Mr. Frick's testimony that although Complainant had not finished reviewing the technical reports, he was satisfied with the results; and that Complainant was generally satisfied with the situation surrounding the performance evaluation, as he had received a revised performance evaluation done by an independent team. TR 370, 372. Mr. Frick also testified that he encouraged Complainant to raise any additional technical concerns with the authors of the technical reports, through his chain of command, or back to the NSC; or to raise any additional concerns regarding the performance evaluation investigation with either himself, or his supervisor, Ken Slagle. TR 370, 372. However, the only further communication Mr. Frick had with Complainant was when Complainant sent Mr. Frick an E-mail stating, "some dissatisfaction with the result, but not identifying any new facts or any information that we could use to reopen the investigation." TR 372. According to Mr. Frick, there was no further investigation and the entire case with the NSC group was closed. TR 372.

Complainant, on the other hand, testified that he was dissatisfied with a number of things

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[4] The technical analysis of Complainant's relay concerns are handled by the responsible technical organization. Consequently, the basis of the NSC's investigation into Complainant's technical concerns would rely on the NEDO analysis commissioned by Mr. Wharton, and ultimately performed by Mr. Berkshire. TR 368-69.

relative to the meeting occurring on November 14, 1994. He stated that he was not allowed or authorized to review the technical reports during work hours; that he was concerned that the NSC investigation of his performance evaluation was not "totally independent"; and that the closure letter from Ken Slagle, the manager of the Nuclear Oversight Division, did not accurately record the events and conversations that took place during meeting. TR 82-84. Complainant also testified that he was concerned about the timeliness of NEDO's response to the safety issues that he had raised. TR 85.

Mr. Frick testified that the December 7, 1994 closure letter addressed to Complainant and written by Mr. Slagle, accurately detailed the discussion and resolution of the issues which Complainant had raised with the NSC group. TR 373; *see* RX 19. In addition, the letter responded to Complainant's concern regarding the timeliness of NEDO's response, stating that an investigation would be conducted and the results would be communicated to Complainant. RX 19. Regarding this investigation, Mr. Frick stated that,

> The conclusion of [this] investigation was that Mr. Khandelwal had not come forward in the [sic] a specific enough way identifying a specific safety issue relative to the subject. The subject had been discussed several times but he had not brought it forward as a specific safety issue nor had he written a nonconformance report which would have resulted in immediate analysis. TR 374.

A subsequent letter dated January 27, 1995 and written by Mr. Slagle, communicated such results to Complainant. RX 18.

At the request of SCE Vice-President Richard Rosenblaum, Mr. Frick and the NSC group were also involved in an investigation regarding all persons who had raised safety concerns in the preceding five years and were tentatively identified as an employee to be severed during the reduction in force. TR 374-75. The scope of such investigation included three levels of findings: (1) that there was no retaliatory motive in severing an employee who raised safety concerns; (2) that there was a clear business reason for severing that employee; and (3) that there was not even an appearance of discrimination in selecting that employee, so as to avoid any "chilling effect on the rest of the organization." TR 375. The NSC group examined the entire selection process, beginning with an analysis of the Katz Staffing Study and then interviewing various people in managerial positions, to assess the validity of which individuals would be retained and which would be identified for severance. TR 375-76, 378. Ultimately, the investigation conducted by the NSC group concluded that there was nothing improper about Complainant's termination, as his severance was not related to his protected activity. TR 376; RX 23.

Apparently, Complainant also filed a complaint with the Nuclear Regulatory Commission (NRC) regarding his July 1995 termination. According to Mr. Frick, the investigation conducted by the NRC concluded that there was no discrimination or retaliation involved in Complainant's severance. TR 378-79. However, Complainant objects to Mr. Frick's characterization of the NRC finding, based on the fact that he had received correspondence from the NRC stating that

the NRC would continue to monitor the U.S. Department of Labor proceedings to determine whether an additional NRC action was warranted.[5]

III. CONCLUSIONS OF LAW

A. Actionable Events Under the ERA

The sequence of events occurring from May 1993 until Complainant's termination in July of 1995 unfold in a period covering more than two years. While all of these events are relevant to the disposition of this matter and to the burdens of proof that must be borne by the parties, all of these events are not actionable under the Section 211 of the Energy Reorganization Act, as amended. 42 U.S.C. § 5851(b)(1) and 29 C.F.R. § 24.3(b)(2) allow a complainant to file his complaint within 180 days of the occurrence of an alleged violation. Mr. Khandelwal filed his original complaint on September 21, 1995. Therefore, no actions taken by SCE prior to March 21, 1995 are actionable under the September 21, 1995 complaint, unless Complainant presents an exceptional circumstance subject to equitable measures.

Respondent accurately notes in its Proposed Findings of Fact and Conclusions of Law that Complainant has failed to identify and argue the application of either the equitable tolling doctrine or the continuing violation doctrine so as to include the 1993 demotion and the 1993 performance evaluation as adverse employment actions that fall within the statutory limitation of the September 21, 1995 complaint. *Respondent's Proposed Findings of Fact and Conclusions of Law, p. 44, n.25.* Because Complainant has proceeded *pro se* in this matter, the undersigned shall briefly address the applicability of these doctrines for the record.

Cases under the ERA recognize that limits for filing a complaint is not jurisdictional, and may be subject to equitable tolling. However, restrictions on equitable tolling are to be scrupulously observed. School District of City of Allentown v. Marshall, 657 F.2d 16, 19 (3d Cir. 1981). There are three circumstances which tolling may be appropriate: (1) the defendant has actively mislead the plaintiff respecting the cause of action; (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. School District of City of Allentown v. Marshall, 657 F.2d 16, 20. As none of the three grounds for equitable tolling exist, even construing the *pro se* complaint and supporting documents as liberally as possible, such exception is not applicable to the case herein.

To establish a continuing Section 211 violation beginning in May of 1993 and lasting through July of 1995, Complainant must prove that a series of alleged discriminatory actions were

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[5] There is no documentation in the record of NRC's findings. Therefore, the undersigned makes no determination as to the activities which NRC conducted with respect to the case herein.

somehow connected, rather than mere isolated decisions involving disparate facts; and that at least one of the discriminatory actions occurred within the limitations period. Varnadore v. Oak Ridge National Laboratory and Lockheed Martin Energy Systems, Inc., 92-CAA-2, 92-CAA-5, 93-CAA-1, slip op. at 73 (Sec'y Jan. 26, 1996); Bonanno v. Northeast Nuclear Energy Company, 92-ERA-40, 92-ERA-41 (Sec'y Aug. 25, 1993). Thus, Complainant must prove that he was subject to a single continuing violation, as opposed to separate and sufficiently permanent acts which should trigger the Complainant's awareness of and duty to assert his rights. Eisner v. United States Environmental Protection Agency, 90-SDW-2 (Sec'y Dec. 8, 1992); McCuistion v. Tennessee Valley Author., 89-ERA-6 (Sec'y Nov. 13, 1991).

To analyze the two actions that occurred outside of the 180 day statutory of limitations period, the 1993 demotion which Complainant received notice of on November 9, 1993 and the 1993 performance evaluation which Complainant received notice of on May 16, 1994, as a "single continuing violation" is completely untenable. As in Bassett v. Niagara Mohawk Power Co., 86-ERA-2 (Sec'y Sept. 28, 1993), the complainant was demoted from a supervisory position in 1981, and attempted to challenge or recover damages for that incident. The claim was ultimately found untimely and could not be resurrected under a continuing violation theory. The Secretary stated that the demotion was a consummated, immediate act which may not be treated as an episode in a continuing violation because its natural effects necessarily carry over on a continuing basis. *See also* English v. Whitfield, 858 F.2d, 957, 962-63 (4th Cir. 1988). As for the 1993 performance evaluation, the Secretary has also held that a poor performance evaluation is a discrete act which cannot be considered part of a continuing violation. McCuistion v. Tennessee Valley Author., 89-ERA-6, *supra*. Such an act has the degree of performance which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate. McCuistion v. Tennessee Valley Author., 89-ERA-6, *supra*.

The incidents of Complainant's 1993 demotion and his 1993 performance evaluation were clearly separate and distinct, and not acts of a continuing nature. *See* Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1480-81 (9th Cir. 1989); London v. Coopers & Lybrand, 644 F.2d 811, 816 (9th Cir. 1981). Rather, such acts were sufficiently permanent to trigger Complainant's awareness of the respondent's alleged discrimination. Berry v. Board of Supervisors of LSU, 715 F.2d 971, 981 (5th Cir. 1983). Consequently, the continuing violation theory does not preserve the timeliness of the 1993 demotion and 1993 performance evaluation as actionable adverse employment actions under the complaint herein. Mr. Khandelwal's termination by Respondent in July of 1995 shall be considered the sole adverse employment action made actionable by the filing of this complaint. However, all events relevant to the relationship between Mr. Khandelwal and SCE, such as the 1993 demotion and 1993 performance evaluation, shall be considered evidence of a possible pattern of discrimination irrespective of the time of their occurrence. *See* Miller v. Ebasco Services, 88-ERA-4 @ 11 (Sec'y Nov. 24, 1992).

B. The Legal Framework of Complainant's Retaliation Action Under the ERA

The legal framework to be applied in ERA whistleblowing proceedings has become a jurisprudence recited ad infinitum in such cases. Although Carroll v. Bechtel Power Corp., 91-ERA-46 @ 4-7 (Sec'y Feb. 15, 1995) has become the standard citation for Secretarial decisions, a brief discussion of the general burdens of proof and production is still necessitated in the case herein.

To prevail in a retaliatory adverse action case arising under 29 C.F.R. Part 24, and the ERA as enumerated therein, the employee must initially present a *prima facie* case consisting of a showing that he engaged in protected conduct, that the employer was aware of that conduct, and that the employer took some adverse action against him. Dartey v. Zack Company of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983), slip op. at 7-8. In addition, as part of his *prima facie* case, the complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. McCuistion v. Tennessee Valley Author., 89-ERA-6, slip op. at 5-6; Mackowiak v. University Nuclear Systems, 735 F.2d 1159, 1162 (9th Cir. 1984).

If the complainant succeeds in establishing the foregoing, the respondent must produce evidence of a legitimate nondiscriminatory reason for the adverse action. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 249 (1981); Dartey v. Zack Company of Chicago, 82-ERA-2 , *supra*, slip op. at 6-9. Once this is accomplished, complainant must then prove by a preponderance of evidence that the articulated reason for the adverse employment action was a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine 450 U.S. 248, 257; Thomas v. Arizona Public Service Co., 89-ERA-19 (Sec'y Sept. 17, 1993), slip op. at 20 (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)). Complainant may demonstrate this burden by showing that the discrimination was more likely the motivating factor or by showing that the proffered explanation was not worthy of credence. This standard is further explained in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519, "[i]t is not enough . . . to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." (emphasis in original).

The finding that a respondent's asserted reasons are pretextual, however, does not compel a finding in favor of complainant. Complainant still retains the ultimate burden of proving by a preponderance of evidence, that the adverse action was in retaliation for the protected activity in which he was engaged. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511. If there is evidence that respondent was motivated by both legitimate and prohibited reason, then a dual analysis is necessary. Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Dysert v. Florida Power Corp., 93-ERA-21 (Sec'y Aug. 7, 1995). In a dual motive case, the respondent must establish by clear and convincing evidence that it would have reached the same decision, even in the absence of protected contact. Yule v. Burns Int'l Security Services, 93-ERA-12 (Sec'y May 24, 1995).

C. Complainant's Prima Facie Case

To establish a *prima facie* case, the complainant need only present evidence sufficient to

prevail until contradicted and overcome by other evidence. Jackson v. The Comfort Inn, Downtown, 93-CAA-7 (Sec'y Mar. 16, 1995) (citing Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y Feb. 15, 1995), slip op. at 11. Having considered the evidence as set forth in Complainant's case-in-chief and construing such evidence in a light most favorable to Complainant, I find the requisite minimal showing of a *prima facie* case has been satisfied herein.

1. Whether Complainant engaged in protected conduct.

Under the ERA, protected conduct engaged in by a complainant can be in the form of filing internal quality control reports or making internal complaints regarding safety or quality problems. Bassett v. Niagra Mohawk Power Corp., 85-ERA-34, *supra*. In addition, any informal safety complaint to a supervisor is sufficient to establish protected activity. Corroborating evidence is not required to establish a *prima facie* showing of protecting activity; the complainant's testimony may be sufficient. Samodurov v. General Physics Corp., 89-ERA-20 (Sec'y Nov. 16, 1993); *see also* Nichols v. Bechtel Construction, Inc., 87-ERA-44 (Sec'y Oct. 26, 1992 (employee's verbal questioning of foreman about safety procedures constituted protected activity), *appeal dismissed* No. 92-5176 (11th Cir. 1992); Dysert v. Westinghouse Electric Corp., 86-ERA-39 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected). Finally, when a complainant alleges a violation, it does not matter whether the allegation is ultimately substantiated; rather, it need only be "grounded in conditions constituting reasonably perceived violations of the environmental acts." Minard v. Nerco Delamar Co., 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8.

Complainant has provided numerous accounts in which he reported compliance and safety concerns regarding the MDR and Agastat relays to various supervisors. Based upon the Findings of Facts as detailed in Section II.B., *supra*, I find that Complainant's conduct from the period of May 1993 through June 1994 warrants sufficient evidence to demonstrate that he engaged in protected conduct. The issue of whether an actual compliance violation existed is irrelevant to the matter herein; as coverage under the employee protection provision extends to any complainant where the conditions constitute a reasonably perceived violation of the underlying act. *See* Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 357 (6th Cir. 1992). The evidence in the record suggests that Complainant's protected conduct was grounded in conditions constituting a reasonable perception that SCE was violating the ERA.

2. Whether Respondent was aware of Complainant's protected conduct.

It is undisputed that Complainant engaged in various activities wherein he attempted to detail the compliance and safety issues associated with the MDR and Agastat relays. It appears, however, a dispute arises upon whether and when Respondent became aware of Complainant's protected conduct. To establish this element, the evidence must show that Respondent's managers responsible for taking the adverse actions had knowledge of the protected activities. Floyd v. Arizona Public Service Co., 90-ERA-39 (Sec'y Sept. 23, 1994). I find that upon consideration of the interactions between Complainant and his various supervisors, Respondent

was made aware of Complainant's protected activities prior to the occurrence of any adverse employment actions against Complainant.

Complainant states that he first raised the issue of the Agastat relay's qualified life to management in the scoping document which he presented during the May 28, 1993 dry-run presentation. However, such issue was confined to a short excerpt of text, containing a general discussion of compliance issues, and using the Agastat relay as an example. RX 24. As was noted in the earlier discussion, there was testimony by Complainant, Mr. Johnson, and Mr. Kaneko attesting to the fact that there was no verbal discussion of such issue.

Despite the foregoing fact, however, Complainant states that during the course of the May 28, 1993 meeting, Mr. Johnson made a statement to the effect that Complainant "better hide [the Agastat 7000 compliance issue], otherwise [Complainant's] supervisor w[ould] go to jail." TR 75. Although Complainant felt such statement was "quite shocking", Complainant made no remarks about the statement during the meeting, or at anytime thereafter. Complainant also testified that no remarks regarding Mr. Johnson's comment were made by the other attendees of the meeting. When Mr. Johnson was asked about the comment on cross-examination, he repeatedly testified that he did not specifically recall making such comment at the May 28, 1993 meeting, but did admit that he has made similar comments on occasion to impress upon other employees the seriousness of working at a nuclear power plant.

Complainant vehemently argues that Mr. Johnson's statement was made to reflect the seriousness of the issue regarding the Agastat relays. Complainant supports this proposition by presenting a documented interview with Roberto Cruz, another employee present at the May 28, 1993 meeting. Mr. Cruz stated in his interview, "the compliance/safety issues were brought up and Ken Johnson made a comment to the effect 'don't bring up these issues or the bosses can go to jail.'" RX 4:1. Mr. Cruz, went on to state, however, that he "felt the comment was made in jest and was not meant maliciously and neither was it meant to be taken seriously." RX 4:1.

Although Complainant vehemently argues that such statement is indicative of the seriousness with which Mr. Johnson understood Complainant's compliance concerns to be, I find that there is no credible evidence on the part of Complainant tending to show that any comment was made with specific reference to the Agastat relay. The emphasis with which Complainant places on Mr. Johnson's alleged comment is misplaced, and does not support a finding that the attendees at the May 28, 1993 meeting were specifically made aware of Complainant's concerns regarding the Agastat relay. Rather, it is Complainant's own testimony that dispels any notion that Respondent was made aware of Complainant's protected conduct on such date, as Complainant acknowledges that there was no verbal discussion about the issue throughout the meeting.

Complainant's next activity wherein protected conduct was implicated is the June 30, 1993 E-mail addressed to Mr. Carlisle, his then supervisor, regarding the qualified life of MDR relays. Such E-mail notification of Complainant's compliance concern was subsequently confirmed in

another E-mail, addressed to Mr. Carlisle and dated September 8, 1993, wherein Complainant requested a meeting to discuss the same. Although these E-mails appear to be informal communications to Mr. Carlisle, such communications are enough to establish that Respondent, by and through Mr. Carlisle, was made aware of Complainant's compliance concerns. Jackson v. The Comfort Inn, Downtown, 93-CAA-7, *supra*, (stating that a complaint to a supervisor is a complaint to the Respondent's management).

In addition, based on the testimony of Mr. Grande, Mr. Stickney, and Mr. Johnson, all three witnesses became aware of Complainant's compliance concerns regarding the MDR relay, as of the January 1994 meeting. Mr. Johnson was further advised of Complainant's concerns regarding both the MDR and Agastat relay in the June 14, 1994 meeting. Although there is no evidence to suggest a substantive discussion regarding such issues had occurred at any point in time, it is clear that Respondent was repeatedly put on notice of Complainant's protected activity from the date of Mr. Carlisle's awareness on June 30, 1993.

3. Whether Respondent took some adverse action against Complainant.

This factor is undisputed. Generally speaking, any employment action by an employer that is unfavorable to the employee's "compensation, terms, conditions, or privileges of employment" may be considered an "adverse action" for purposes of the *prima facie* case. *See* DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983) (Section 5851 prohibits discrimination in practically any job-related fashion); *see also* 29 C.F.R. § 24.2(b). Since the time which Complainant raised his concerns with the MDR and Agastat relays and Respondent became aware of such protected activity in June of 1993, it is clear and undisputed by the Respondent that Complainant has suffered adverse actions. Such adverse actions came in the form of Complainant's November 1993 demotion, his 1993 performance evaluation which he received in May 1994, and his ultimate termination in July 1995.

4. Whether Complainant has presented evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action.

To establish the foregoing element, a complainant need only produce evidence to raise the inference that the motivation for the adverse action was his protected activity; a complainant need not actually establish motivation. Pillow v. Bechtel Construction, Inc., 87-ERA-35 (Sec'y July 19, 1993). A complainant may carry this burden of proof of causation by a showing of direct or circumstantial evidence. Dillard v. Tennessee Valley Author., 90-ERA-31 (Sec'y July 21, 1994).

A causal connection between the protected activity and the adverse employment action may be established circumstantially by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter. *See* Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989); Larry v. Detroit Edison Co., 86-ERA-32 (Sec'y June 28, 1991). Thus, proximity in time can be considered solid evidence of causation. White v. The Osage Tribal

Council, 95-SDW-1, slip op. at 4 (ARB Aug. 8, 1997). *See also* Carson v. Tyler Pipe Co., 93-WPC-11 (Sec'y Mar. 24, 1995) (ten months between protected activity and adverse action sufficient to raise inference of causation); Thomas v. Arizona Public Service Co., 89-ERA-19, *supra* (one year sufficient to raise inference of causation).

An analysis of the chronology of events and the proximity in time between the protected activity and the adverse actions which Complainant was subjected to reveals that Complainant raises an inference that certain adverse employment actions were motivated by Complainant's various attempts to notify Respondent that he was concerned about certain compliance and safety issues.[6]

With respect to the first adverse action which Complainant contends he was subject to, his November 1993 demotion, an analysis of circumstantial evidence supports an inference that his demotion was a result of protected activity. As noted above, Mr. Carlisle first became aware of the issue regarding the MDR relay on June 30, 1993. Although, Mr. Carlisle subsequently left the employ of SCE in the fall of 1993, he executed a mid-year evaluation of Complainant in October of 1993. RX 10. Such evaluation stated that although Complainant generally performed on target, he suffered from a number of specific deficiencies, *i.e.*, he needed improvement in his written skills, he needed to reduce his adversarial approach, and he provided the employees working under him with poor exposure to management. This adverse performance evaluation was ultimately used and served as a factor to be considered upon choosing the supervisors to be retained or demoted. RX 42:2. Although I find that the relationship between Mr. Carlisle's mid-year evaluation and Complainant's demotion somewhat tenuous because there is no evidence to show that the people responsible for consolidating the electrical and controls discipline and choosing the supervisors to be demoted were aware of the compliance concern that Complainant had raised with Mr. Carlisle, it nevertheless suffices to circumstantially demonstrate an inference of retaliation.

The next adverse employment action which Complainant suffered was the negative 1993 performance evaluation executed in February 1994 by Mr. Johnson, a month subsequent to the discussion which Complainant had with Mr. Grande, Mr. Stickney, and Mr. Johnson. As the evidence indicates, all three witnesses were made aware of Complainant's compliance concerns regarding the MDR relay. Moreover, the testimony of all three witnesses support a finding that although Mr. Johnson may not have been concerned about the substantive technical issue involved, he did express frustration about the fact that such problem had languished and had remained unresolved. Testimony regarding Mr. Johnson's knowledge and consequent reaction to the discussion of Complainant's June 30, 1993 E-mail sufficiently supports an inference that Mr. Johnson's "below standard" performance evaluation was in retaliation for Complainant's protected conduct.

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[6] It bears noting that Respondent's proffered reasons for any adverse actions taken against Complainant cannot be considered against the causal element of Complainant's *prima facie* case, but rather is merely considered upon the presentation of Respondent's rebuttal evidence. Hobby v. Georgia Power Co., 90-ERA-30 (Sec'y Aug. 4. 1995).

Finally, a number of events occurred in the fourteen months prior to Complainant's termination in July of 1995. Subsequent to Complainant receiving his 1993 performance evaluation, he informally met with Mr. Johnson on June 14, 1994 to discuss the results of the same. Throughout the course of this meeting, Complainant also raised the technical issue of the MDR and Agastat relays which had continued to remain unresolved.[7] This informal meeting was followed by a formal Request for Review Level One on June 24, 1994, and then a formal Request for Review Level Two on August 11, 1994. Ultimately, the last action with respect to Complainant's 1993 performance evaluation was taken in October of 1994, wherein the evaluation was upgraded a number of points.

The issue of Complainant's concerns regarding his performance evaluation is analogous to the case of Diaz-Robainas v. Florida Power & Light Co., 92-ERA-10 (Sec'y Jan. 10, 1996), whereby the Secretary held that a complaint to management alleging retaliation for his safety concerns was protected activity. In Diaz-Robainas, the Complainant alleged in a letter complaining about a negative performance appraisal that the appraisal was in retaliation for his "commitment to projects that [he] considered critical for the nuclear safety of [the facility] and which [certain supervisors] for budgetary or other reasons, clearly opposed." The Secretary found that the Complainant's perception of retaliation for raising protected concerns was reasonable, and that his raising of fairness of the rating was not disingenuous. Similarly, Complainant has continuously expressed concern that the "below standard" evaluation was not indicative of the work that he actually performed during the relevant time period, but rather that the sole reason for the poor performance evaluation was attributable to retaliatory motives. CX B32.2. As such, a sufficient causal nexus is established between Complainant's protected conduct of complaining about his negative performance appraisal and his July 1995 termination.

Based on the foregoing evidence, I find and conclude that Complainant has met his burden in establishing a *prima facie* case. Complainant has engaged in protected conduct; Respondent was aware of such conduct; Complainant was subject to various adverse employment actions; and based on the circumstantial evidence provided, Complainant has raised an inference, albeit a modest inference, that the protected activity was the likely reason for the adverse action.

C. Respondent's Legitimate Nondiscriminatory Motives

Respondent now has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory motives. Significantly, while Respondent bears only a burden of producing evidence at this point, the ultimate burden of persuasion of the existence of intentional discrimination rests with Complainant. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55, *supra*; Dartey v. Zack Company of Chicago, 82-ERA-2, *supra*, slip op. at 6-9.

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[7] As previously noted, it was this discussion which led to Complainant's June 24, 1994 E-mail detailing the MDR and Agastat relay compliance and safety concerns, which ultimately promulgated Mr. Johnson to finally engage in formal analyses of the issues.

1. Complainant's 1993 demotion

On November 9, 1993, Complainant's supervisory position was eliminated, and the group of employees that worked under him was abolished. Respondent has properly buttressed any claim that such demotion was due to retaliation for raising safety concerns by demonstrating that during such time, there was a legitimate re-organization of the employment structure so as to necessitate a certain number of demotions. Mr. Johnson, who was the NCDB manager at the time, was asked by the NEDO manager, Mr. Wharton, to assume management of the electrical discipline and combine such discipline with the controls group headed by Mr. St. Onge. This consolidation was undertaken so as to accommodate a substantial reduction in force.

The supervisory demotions were based on independent evaluations of the supervisor's performance, oral communication skills, interpersonal skills, decision making skills, management skills, and organizational skills. All four discipline managers performing such evaluation, Mr. St. Onge, Mr. Verbeck, Mr. Johnson, and Mr. Yackle gave Complainant the lowest score of the thirteen supervisors reviewed. Mr. St. Onge rated Complainant a 34 while the next lowest rating was 42 and his highest rating was 63. RX 43:4. Mr. Verbeck gave Complainant a score of 30 while the next lowest score was 39 and the highest score was 60. RX 43:2. Mr. Johnson rated Complainant a 26 while the next lowest score was 43 and the highest score was 74. RX 43:3. Finally, Mr. Yackle gave Complainant a score of 23 while the next lowest score was 27 and the highest score was 60. RX 43:1. Based on these ratings, Complainant and three other supervisors lost their supervisory positions on November 9, 1993.

Complainant testified that he had never spoken to Mr. St. Onge, Mr. Verbeck, or Mr. Yackle about the relay issues. Moreover, as of November 1993, when these decisions were made, Mr. Johnson was not aware that Complainant had raised any compliance or safety issues. *See supra discussion III.C.2*. Finally, while it is clear that the specific criteria used to identify the selection of supervisors included Complainant's mid-year performance evaluation, other than the circumstantial link of temporal proximity, there is no evidence to suggest that Mr. Carlisle's evaluation was retaliatory. Rather, it appears Mr. Carlisle's 1993 mid-year evaluation of Complainant's performance was substantially documented with specific reasons and interactions with Complainant, which validated his "below standard" evaluation. RX 3:2.

It is clear that Complainant's demotion was the result of an independent rating of his performance by managers within NEDO, and that the supervisors who evaluated him had no awareness that he had raised any compliance or safety concerns regarding the Agastat relay. Thus, Respondent has successfully rebutted Complainant's contention that the 1993 demotion was in retaliation for Complainant having engaged in protected activity.

2. Complainant's 1993 Performance Evaluation

The evidence which Respondent presents on its behalf sufficiently demonstrates to the

undersigned that Complainant's "below standard" 1993 performance evaluation was due to the fact that he performed poorly during the review period, and not because he engaged in protected activity. A significant factor contributing to the poor performance evaluation was Complainant's failure to provide a proper scoping document for the RML project. Although Complainant strenuously argues that his participation provided valuable information to the overall project of the NCDB committee, such contribution is not at issue. The significant issue to be determined was whether Complainant ultimately prepared a scoping document sufficient to meet the expectations of those supervisors at the dry-run presentation. The credible testimony of Mr. Johnson, Mr. Kaneko, and supporting documents from Mr. Carlisle and Mr. Cruz[8], support a finding that Complainant's efforts in creating the scoping document were ultimately deficient, and did not meet the goals as necessary.

Mr. Johnson's performance evaluation was further based on an evaluation of Mr. Carlisle's 1993 mid-year performance evaluation. Mr. Carlisle had noted several areas where Complainant's performance required improvement: (1) Complainant's group's work product was often poorly written; (2) Complainant had been adversarial in his dealings with others; and (3) Complainant failed to expose engineers working under him to management. RX 10.

In preparing Complainant's evaluation, Mr. Johnson reviewed Mr. Carlisle's comments to determine whether such comments were valid. Complainant did not challenge Mr. Carlisle's evaluation at that time, and thus Mr. Johnson accepted it as a reliable appraisal of Complainant's performance through October 1993.[9] With regard to Complainant's adversarial approach, Mr. Johnson interviewed various people who had worked with Complainant and verified that Complainant had been uncooperative, and that his interpersonal style created difficult situations. Further, based on Mr. Johnson's review of Complainant's written work on the RML project, and after reviewing comments from outside organizations criticizing Complainant's work product, he concluded that Mr. Carlisle's criticism in this regard was valid as well. Finally, Mr. Johnson verified Mr. Carlisle's comment that Complainant had failed to expose engineers under his supervision to management. Mr. Johnson determined that Complainant failed to allow any of the engineers who worked with him to appear at management meetings to make substantive presentations. Based on the fact that Mr. Johnson was not Complainant's immediate supervisor and thus, not in a position in which he could easily assess Complainant's performance first-hand, I find that Mr. Johnson was as thorough as possible in his initial evaluation. As such, I do not find that the 1993 "below standard" performance evaluation was rooted in any retaliatory motive, but

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[8] In an interview dated September 12, 1994, Mr. Cruz spoke specifically about his involvement in the RML project. Not only did he participate in the working group, but he also participated as a presenter in the pre-presentation meeting with Complainant on May 28, 1993. Mr. Cruz indicated that he believed that the presentation of issues were unclear and that improper conclusions were made. Mr. Cruz felt that the RML project was canceled due to economic reasons, rather than any safety issues that were raised. RX 4:2.

[9] Although there is no record that Complainant ever challenged Mr. Carlisle's mid-year performance evaluation at the time, Complainant did subsequently challenge Mr. Carlisle's review in the investigations performed by the NSC.

rather, was administered legitimately and nondiscriminatorily.

Complainant argues that because he appealed his 1993 evaluation internally and ultimately received a slightly higher score during the re-evaluation process, that the initial evaluation of 23 done by Mr. Johnson must have been in retaliation for his protected conduct. The principle difference in scores, however, was due to the fact that Mr. Johnson had down-graded Complainant in two categories for his adversarial approach while the independent appraisal only down-graded Complainant in one area for being adversarial. Complainant did not challenge the results of the independent re-evaluation, signifying some complacency with his revised score of 27. The mere fact that Complainant received a modest increase in his independent re-evaluation, or that Mr. Johnson differed in his application of negative comments fails to support any inference that the initial evaluation was given to Complainant in retaliation for his protected conduct.

3. Complainant's July 1995 termination

Finally, the undersigned is also sufficiently persuaded that Complainant's 1995 termination was a result of a legitimate nondiscriminatory reduction in force. Once SCE made the decision to close one of its nuclear reactors at SONGS, and also substantially decrease the number of new capital projects to be undertaken at the remaining SONGS units, SCE initiated two separate staffing studies of its nuclear operation at SONGS. Both staffing studies indicated that a substantial personnel reduction was to be made upon the closing of the SONGS unit. The more appropriate number for employee retention was 2549, rather than the 3200 personnel already working at SONGS. As Mr. Katz testified at the hearing, he recommended that the electrical/controls discipline in which Complainant work would be reduced from over 90 employees to 53 employees.

In deciding which engineers would be retained, NEDO management first determined the appropriate mix of skills among the various types of engineers. Many of the engineers who had previously been involved in capital projects were selected for termination. As a check on the selection process, NEDO ranked all of its engineers based on the average of their evaluations in the previous four years, as well as their last evaluation score taken as a whole

The record is undisputed that Complainant's skills and experience were in capital projects and that Complainant was released along with a large number of other engineers with similar skills and experiences because employees with such skills were no longer needed. Among his immediate colleagues, Complainant was one of seven engineers released because of the reduction in capital projects. Additionally, Complainant's evaluation scores were substantially lower than those of the engineers retained within NEDO. The four-year average score of those retained during the 1995 downsizing was 34.08 and average 1994 evaluation score was 35.32. In contrast, Complainant had a four-year average of 29 and a 1994 score of 28.

It was Complainant's understanding that subsequent to his termination, four contract employees who had similar backgrounds to Complainant had been hired on to take over

permanent positions. Complainant further explained in his testimony that he attended a meeting wherein the subject of contract employees was raised, and that the upper management's response to said issue was that the company policy would be to retain the Edison employee as much as possible. Complainant argues that the retention of contract employees, rather than a permanent employee such as himself, is evidence of retaliatory behavior. Mr. Katz, however, credibly testified regarding the business justification for retaining contractors while releasing SCE employees. He stated two reasons for such strategy, "[o]ne is typically a project of short duration, that they need to complete that work, and then we don't need their services any more. And that is why we use a contractor. And second, we find sometimes that the expertise we need to be successful on projects doesn't reside within the organization. And therefore we go out and we contract for that expertise." TR 194.

Based on Mr. Katz' testimony and his staffing study, it is clear to the undersigned that Complainant's termination was unrelated to his protected activity, but rather was a result of a legitimate reduction in force. Respondent established that it conducted its reduction in force in a nondiscriminatory fashion wherein multiple employees of the same skill level and expertise were terminated at the same time; there was no suggestion that the other employees were also targets of retaliation; and the selection for discharge was not in any way improper, as the low performance rating given to Complainant appears reasonable and valid. Shusterman v. Ebasco Servs. Inc., 87-ERA-27 (Sec'y Jan. 6, 1992). It is clear to the undersigned that Complainant would have been terminated from SCE even in the absence of any protected activity.

D. Complainant's Ultimate Burden

Where the respondent articulates legitimate nondiscriminatory reasons for the adverse action, the complainant has the ultimate burden of persuading the trier of fact that the reasons articulated by the respondent were pretextual, either by showing that an unlawful reason more likely motivated the respondent or by showing that the proffered explanation is not worthy of credence. Nichols v. Bechtel Constr. Inc., 87-ERA-44, *supra*. At all times, the complainant has the burden of showing that the real reason for the adverse action was discriminatory. St. Mary's Honor Center v. Hicks, 509 U.S. 502, *supra*.

Complainant fails to present any affirmative evidence showing that Respondent's adverse actions taken against Complainant were pretextual. In fact, Complainant merely sets forth the principle found in 18 C.F.R. § 18.6(2)(i), and argues that Respondent's failure to comply with a discovery order issued by the undersigned should allow the application of the "adverse inference rule"[10] to certain matters. *Complainant's Proposed Findings of Facts and Conclusions of Law, pps. 17-21*. I note from the outset of this analysis that Complainant's argument fails in persuasiveness because there are no underlying facts to support the inferences that Complainant

[10]18 C.F.R. §18.6(d)(2)(i) states in pertinent part: "If a party . . . fails to comply with . . . an order . . . the administrative law judge . . . may . . .[i]nfer that the admission, testimony documents or other evidence would have been adverse to the noncomplying party."

directs the undersigned to draw as a matter of law.

First, Complainant argues that Respondent was dishonest in their representation of which employees were retained and which were terminated based on their performance evaluations. *Complainant's Proposed Findings of Facts and Conclusions of Law, p. 16.* Based on a document which Respondent supplied to Complainant after a discovery deadline issued by the undersigned, Complainant speculates that two employees with lower performance evaluations than Complainant were retained, while he, with a higher performance evaluation, was terminated because of his protected activity. CX D13.1-13.10; *Complainant's Proposed Findings of Facts and Conclusions of Law, p. 19.* The document which Complainant refers to is a confidential index of employees within NEDO, wherein each name is blacked out, but their title, the results of their performance evaluations from 1992-1995, and the date of their last promotion or hire, are readily seen. CX D13.1-13.10. Complainant argues that he had a right to the names of such employees, and because he did not receive the document in a timely fashion, the undersigned should apply the "adverse inference rule," and find as a matter of law, that two employees did in fact have a lower performance evaluation.

Because Complainant's argument with respect to the identities of the employees is wholly speculative, there are no facts to support the undersigned to rule adversely against Respondent based on non-compliance of a discovery order. The document which Complainant refers to has little substantive relevance based on the fact that the evaluation scores cannot be attributed by name, and thus serve no useful purpose in understanding which employees had higher and lower scores, and which were then ultimately retained or terminated based on such scores. Moreover, I found Mr. Johnson to be a credible witness on this issue and believe his statement that no employees with lower scores than Complainant were retained.

With respect to four other items relative to Complainant's untimely Request For Production of Documents, Complainant requests that the undersigned to apply the "adverse inference rule" in wholesale fashion. Once again, as I find no underlying facts in the entire record to support the inferences that Complainant requests the undersigned to find, Complainant's request is denied.

Upon a thorough review of the evidence provided by both parties, I find that the compliance and safety issues which Complainant raised throughout the course of his employment with SCE during the period between May 1993 and his ultimate termination were not at issue when Complainant was demoted, when he received a poor performance evaluation for 1993, or when he was terminated in a legitimate reduction in force. Such adverse employment actions would have occurred in the absence of any protected activity. Complainant has failed to sustain his ultimate burden of proof in showing by a preponderance of evidence that Respondent was motivated, in whole or in part, by Complainant's protected activities. As such, engaging in the balance of the analytical framework is futile.

It is noted for the record, among the remedies which Complainant seeks in this matter,

reinstatement and loss of income from the date of termination to the time of reinstatement, Complainant also seeks an additional $1,500.00 to cover miscellaneous expenses. As all remedies in this matter are denied for lack of proof that a Section 211 violation actually occurred, Complainant's request for additional expenses is also denied. Not only did Complainant fail to prevail in his Section 211 complaint, but Complainant failed to provide proof of expenses incurred in the matter herein.

ORDER

For the foregoing reasons, Complainant's complaint based on Section 211 of the ERA as amended, is hereby DISMISSED.

HENRY B. LASKY
Administrative Law Judge

Dated:
San Francisco, California

NOTICE: This Recommended Decision and Order will be automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F. R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).